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ABSTRACT

A review of federal court decisions in the area of cable television and First Amendment rights reveals an early, unified perception of cable's First Amendment status that has given way in the past decade to fragmented and often contradictory positions among lower level courts. This makes the problem before the courts today one of choosing from, or reconciling, the conflicting models that have been applied in different jurisdictions and contexts. Specifically, such a review suggests that judicial decision making has been guided by definitions of cable television that have moved through historically defined paradigms. In its early period, for example, cable was seen as an auxiliary service, a retransmission device without standing as a First Amendment speaker. This model dissolved, however, with changing technology and changing popular opinion as to the nature and social role of the medium in the 1970s. The 1981 decision in "Community Communications v. Boulder" appears to be a "state of the art" exposition of the First Amendment status and problems of cable delivered expression. It seems to accept that cable is a medium and a speaker for First Amendment purposes. However, the courts remain confused about whether there exists a sound rationale for government regulation of cable speech, what form that rationale might take if it does not exist, and the nature and extent of permissable controls given a particular rationale. (FL)

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The Auxiliary Medium and the Courts: Judicial Consideration of Cable TV and the First Amendment

by

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ABSTRACT

This paper considers the history of judicial thinking in the area of cable television and the First Amendment. It traces judicial perceptions of the medium and its First Amendment status from Clarksburg Publishing Co. to Wilkinson and suggests an early, uniform approach to the problem that has given way in the 1970s and 1980s to the adoption of conflicting positions by various jurisdictions in various contexts, and has left cable without a clear First Amendment role despite strong arguments that it should be accorded one.

In the past few years, the issue of the constitutional status of cable television has been an increasingly debated one; the industry claims it should be granted the same protection as the print media [1] and many important regulators agree. [2] Yet, state and local authorities advocate and implement regulations more in keeping with a broadcast model of First Amendment rights. [3] There have been proposals to rewrite the First Amendment to extend protection to all electronic media, but the possibility of adoption of such a revision seems remote given the constitutional and political realities of such an undertaking. The resolution of the constitutional question, therefore, most certainly must come from the courts.

It is the purpose of this paper to consider the history of judicial decision making in the area of cable television and the First Amendment, with an eye toward outlining the issues that have captured judicial thinking and which may serve as the foundation for future decision making. It will be suggested that a review of important decisions in this

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1. "The First Amendment: A New Interpretation Needed for Cable," Cablevision, May 18, 1981, pp. 114-56.

2. F.C.C. Chairman Mark Fowler has repeatedly expressed his desire to provide stronger First Amendment protection to both cable and broadcast, see, e.g., Broadcasting, June 22, 1981, pp. 22-23.

3. See, e.g., Broadcasting, Feb. 21, 1983, pp. 73-74, describing recent state and local proposed and adopted prohibitions on vaguely-defined "indecent" program material.

area reveals an early, unified perception of cable's First Amendment status that has given way in the past decade to fragmented and often contradictory positions among lower level courts, making the problem before the judiciary today one of choosing from, or reconciling, the conflicting models that historically have been applied in different jurisdictions and contexts. More specifically, it is suggested that judicial decision making has been guided by definitions of cable TV that have moved through historically defined paradigms. Cable, therefore, in its embryonic period was seen as an auxiliary service, a retransmission device without standing as a First Amendment speaker. This model dissolved, however, with changing technology and changing popular opinion as to the nature and social role of the medium in the 1970s. Various new paradigms have been considered in its place, but no one perspective has yet been adopted, and cable, at present, remains a medium without a clear constitutional role despite strong arguments in favor of such a role.

The analysis was limited in this study to the federal courts as they remain the final arbiters of such issues, and, for expository purposes, cases were organized according to their relationship with issues of freedom of expression in the following four-level taxonomy:

> Type 1. Cases in which issues of freedom of expression were neither raised nor addressed.
>
> Type 2. Cases in which the plaintiff, defendant or

petitioner raised constitutional questions but the court declined to address them, deciding the case on narrower grounds. [4]

Type 3. Cases in which the court addressed the First Amendment questions only in dicta. [5]

Type 4. Cases in which the decision of the Court was based in full or in part on First Amendment grounds. [6]

Type 1 cases, and to some extent Type 2 cases, are pertinent to this study only when the court's discussion of cable television sheds light on how the judiciary perceived the medium. Therefore, to the extent that, for example, copyright cases illustrate court thinking about cable, such cases will be analyzed here. Otherwise, the discussion will be limited to cases relevant to the First Amendment, with the greatest attention devoted to cases in which constitu-

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4. While lower courts seemingly have little reluctance to address constitutional issues either in dicta or as part of the decision of the court, the historic policy of the Supreme Court is, of course, to consider constitutional questions only in situations of strict necessity, (see, Rescue Army v. Municipal Court of the City of Los Angeles, 331 U.S. 549 (1947); Parker v. Los Angeles County, 70 S.Ct. 161, (1949); State of Minnesota v. National Tea Co., 309 U.S. 551 (1940)) and will refrain from deciding the constitutional question if "the record presents some other ground upon which the case may be disposed of . . . or if a construction of the statute is fairly possible by which the question may be avoided." (Rescue Army, at 1420).

5. See e.g., Midwest Video v. F.C.C., 571 F.2d 1025 (8th Cir. 1978).

6. See e.g., Home Box Office v. Wilkinson, 531 F. Supp. 987 (1982).

tional issues were pivotal (i.e., Type 4 cases), cases in which the judges or justices spent some effort in examining the expression issues even if in dicta (i.e., Type 3 cases), or cases which appear to represent turning points in general judicial perceptions of cable.

The Auxiliary Medium and the Courts

The first federal court case in which cable television was an issue appears to be Clarksburg Publishing Co. v. F.C.C., [7] a 1955, Type 1 case involving a challenge to the application for a broadcast license based on cross-ownership concerns. The issue before the court was whether cable could be considered a regulated service for the purpose of deciding the cross-ownership question. Despite the lack of such assertion by the F.C.C., the court found cable could be classified as a regulated medium for these purposes, explaining:

> The Commission will presumably assert jurisdiction to regulate community antenna systems if and when it concludes that such systems provide or are adjuncts of a broadcast service. Its failure thus far to assert such jurisdiction, standing by itself, cannot support a conclusion that the systems are not a service within the meaning of the rule. [8]

While the case did not deal directly with the issue of cable's First Amendment status, the dicta does provide an

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7. 225 F.2d 511 (D.C. Cir. 1955).

8. Id. at 517.

early indication of how cable was perceived by the courts. The implication is clearly that CATV was some form of auxliary broadcast service that could be federally controlled.

The possibility that there might be some constitutional questions surrounding the regulation of cable did not come before the courts until the F.C.C.'s decision in Carter Mountain Transmission Corp. when the door to such control was thrown open. [9] Carter Mountain, in 1963, began an important series of Type 4 cases that provided the first major judicial statements on cable's First Amendment position. In its hearing before the D.C. Circuit Court, the microwave company argued that, among other things, the Commission rules constituted an abridgment of First Amendment rights of the cable companies that received the signals. [10] But the court dismissed the First Amendment argument, pointing out that the rights of the cable systems were not at issue since the F.C.C. rules restricted only the microwave operator and not the cable operator directly. Further, the F.C.C. had complete constitutional authority, under N.B.C. v. U.S. [11] to regulate the airwaves. Explained the court:

> It may be assumed that any denial of a license to transmit radio or television programs keeps off

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9. The F.C.C. restricted the application for a microwave license to a company serving a CATV system on the grounds of potential economic harm to local broadcasters, 32 F.C.C. 459 (1962).

10. 321 F.2d 359 (D.C. Cir. 1963).

11. 319 U.S. 190 (1943).

> the air, and hence deprives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulation is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of "public interest, convenience and necessity" has not been met, is not a denial of free speech. [12]

Two years later the same court turned away a request that F.C.C. rules on non-duplication of programming [13] be struck down. The plaintiffs in Idaho Microwave, Inc. v. F.C.C. argued, in part, that the rules violated the First Amendment rights of the microwave company that imported the signals. [14] In contrast to the Carter Mountain decision, the constitutional question was squarely before the court in this case because the rules at issue did affect the normal operation of the cable system as well as the microwave relay system. But because the aggrieved party was again a service that used the airwaves, the rationale for upholding the rules remained the same, the need for regulation of a scarce, publically-owned resource.

The logic behind these two cases is inescapable if one accepts the foundation of N.B.C. v. U.S. They are logical extensions of the broadcast doctrine and in that way unremarkable. It is their use in subsequent cases that is of in-

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12. 321 F.2d at 364.

13. First Report and Order, 38 F.C.C. 683 (1965).

14. 352 F.2d 729 (D.C. Cir. 1965).

terest.

The first CATV case in which substantive First Amendment questions were addressed by the court in a situation not involving microwave was Buckeye Cablevision, Inc. v. F.C.C. in 1967. [15] Following the Commission's Second Report and Order in 1966, [16] a cease and desist order was issued against Buckeye Cablevision to halt the importation of distant television signals. [17]

Buckeye appealed the order, charging that, among other things, it violated the company's First Amendment right to freedom of speech. The court dismissed the proposition without significant written consideration, responding in two terse sentences that, "It is true that CATV disseminates programs carrying a wide range of information. But we think the restraint imposed by the rules is no more than is reasonably required to effectuate the public interest requirements of the (Federal Communications) Act." [18] More in-

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15. 387 F.2d 220 (D.C. Cir. 1967). A First Amendment challenge to the authority of a municipality to regulate CATV was mounted a year earlier in Dispatch, Inc. v. City of Erie, 364 F.2d 539 (3rd Cir. 1966), but the court there declined to even consider the question, stating, "The censorship or free speech issue is underdeveloped and cannot be determined on the present record." (at 542).

16. Asserting jurisdiction over all CATV systems and implementing new carriage, non-duplication and distant signal rules, 2 F.C.C. 2d 725.

17. Buckeye, operating in Toledo, Ohio, was ordered to stop carrying WJIM-TV out of East Lansing, Michigan.

18. 387 F.2d at 225.

teresting than the court's conclusion, however, was its use of N.B.C. v. U.S. and Carter Mountain to support the decision. Here, for the first time, the court extended precedent based on the scarcity rationale to a case that did not involve the airwaves. As would be noted by later courts, this extension was a clear error in judicial thinking. [19] The facts of Buckeye were not analogous to N.B.C., Carter Mountain, or any other broadcast-bound medium, and the constitutional question clearly should not have been dismissed on those grounds.

What the decision demonstrated was the degree to which the courts, at this time, were bound up in a perception of cable television that could not be separated from broadcast television. In the crudest terms, television simply was, to many, television, whether it came over the airwaves or over a wire. And since very few systems did much more than retransmit broadcast signals, the technical distinction was not emphasized in the daily programming. Dicta from a 1968 Type 1 case of the Fourth Circuit Court of Appeals is representative of the judicial viewpoint. Noted the court:

> Appreciation of (the F.C.C.'s) problems is reflected in the history of CATV's origin, its development and its relation to television nationwide. It is primarily a televisionary (sic) complement. Further, a CATV system is very largely dependent upon the existence of a live station, from which is obtained its stock in trade -- TV programs. [20]

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19. See disc., infra., p. 30.

20. Wheeling Antenna Co. v. United States, 391 F. 2d 179 at 183 (4th Cir. 1968).

At the Supreme Court, the early definition of cable was similarly unrefined, as was demonstrated in Fortnightly Corp. v. United Artists Television, a 1968, Type 1 case in which the Court was presented with the question of CATV's copyright liability. [21] Was cable a service that "performed" material and was therefore liable for copyright infringement? The Court answered by declining to recognize CATV as a separate, independent communication system capable of initiating speech. Justice Stewart, for the Court, explained that only viewers and broadcasters had significant roles within the framework of the television delivery system, and:

> When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcast signals; it provides a well- located antenna with an efficient connection to the viewer's set. . . . CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. [22]

Cable televison, therefore, was not a medium and not a "speaker" in the First Amendment sense of the word. It was considered variously as an extension of the viewer's antenna, an extension of the broadcast system or simply a passive retransmission system with little or no discretion as to program content. [23] Naturally, without designation as a

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21. 392 U.S. 390 (1968).

22. Id. at 399.

23. Id. at 400-1.

medium or a speaker, there was no strong First Amendment protection from government regulation, as a series of cases brought before three different circuit courts in 1968 illustrated. In Black Hills Video Corp. v. F.C.C. in the Eighth Circuit, [24] Conley Electronics Corp. v. F.C.C. in the Tenth Circuit, [25] and Titusville Cable TV, Inc. v. United States in the Third Circuit, [26] various First Amendment attacks on government regulation were repelled. All the cases involved the F.C.C.'s 1966 Second Report and Order. Black Hills attacked the entire Report and Order, Conley and Titusville addressed only the non-duplication rules. In each case, however, the courts upheld the constitutionality of the rules using as precedent prior cases based, in part, on the scarcity rationale. In Conley, for example, the Tenth Circuit noted, "Several courts have rejected similar contentions in upholding a denial by the Commission of a license by a microwave carrier seeking to serve a CATV system," and microwave cases were "indistinguishable" from the pure cable case at hand. "In both situations, what is involved is reasonable regulation in the public interest," said the court, citing N.B.C., Carter Mountain and Buckeye. [27]

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24. 399 F.2d 65 (8th Cir. 1968).

25. 394 F.2d 620 (10th Cir. 1968), cert. denied, 393 U.S. 858.

26. 404 F.2d 1187 (3rd Cir. 1968).

27. 394 F.2d at 624.

And when the scarcity rationale itself was argued by the cable operators as inapplicable, the court fell back on the justification of an inseparable relationship between broadcasting and CATV. Said the court in Black Hills:

> The Commission's effort to preserve local television by regulating CATV has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the congressional power that the CATV systems do not themselves use the airwaves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon and relationship with the television broadcast service. [28]

This particular concept of the function of cable television serves greatly to explain the Supreme Court's lack of consideration of the First Amendment issue in the first challenge of the Commission's authority to reach the Court. In a decision handed down just a few days before Fortnightly, the only question that concerned the Court was that of Commission authority under the Communications Act to regulate cable. In the landmark case Southwestern Cable Co. v. United States [29] the Court dwelt only upon the statutory parameters of F.C.C. jurisdiction, concluding that cable constituted "interstate communication by wire" as per Section 152(a) of the Communications Act [30] and was therefore generally subject to F.C.C. regulation for the purposes of

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28. 399 F.2d at 69.

29. 392 U.S. 157 (1968).

30. 47 U.S.C. Section 152(a).

advancing the orderly development of the television system in the United States. The limits of that authority were left ill-defined, with guidance coming only in the admonition that such regulations be "reasonably ancillary" to the Commission regulation of broadcasting, implying that jurisdiction did not extend to cable in all situations. [31] But nowhere in the decision did the Court discuss possible constitutional problems. The words "First Amendment" and "freedom of speech" do not appear in any of the opinions.

By 1969, then, it was possible for the courts, leaning on a solid body of law, to quickly dismiss any claim of First Amendment rights for cable operators or cable viewers.

Total Telecable v. F.C.C., a Type 1 case that, in part, challenged the constitutionality of specific F.C.C. non-duplication regulations, was typical. [32] Said the Ninth Circuit:

> Total argues that the non-duplication rule is invalid because it is an improper restraint on free speech in violation of the First Amendment. This argument has been considered and rejected in a number of cases, and we agree with them. (Citing, Titusville, Black Hills, Conley and Buckeye.) [33]

This passive model of CATV remained the major perspective in both the appellate courts and the Supreme Court well into the 1970s, long after the changing technology and popu-

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31. Id. at 178.

32. 411 F.2d 639 (9th Cir. 1969).

33. Id. at 641.

lar notions of the social role of the technology had forced regulatory changes based on a perspective grounded in the concept of cable as an important, independent and active component in the national communication system. [34]

Judicial doubts about the efficacy of the older perspective did begin to creep into some decisions, however, as the new social role of cable claimed more adherents. Such sentiments were reflected only in minority opinions or in dicta, but spoke to a growing uncertainty about the medium. The continued dominance of the passive model and this new skepticism as to its validity both were illustrated by the Supreme Court's opinions in Midwest Video Corp. v. F.C.C.[35] and C.B.S., Inc. v. Teleprompter, [36] decisions which betrayed the increasing confusion as to the appropriate judicial attitude toward cable.

Midwest Video I, in 1972, found the Court directly challenged by growing definitional problems associated with cable, and the clash between the emerging view of cable and the established set of definitional guidelines.

At issue were the F.C.C.'s 1969 local origination rules mandating cable-originated programming for some systems. [37]

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34. See, e.g, Second Report and Order, in Docket No. 18397, 23 F.C.C. 2d 816 (1970), in which the Commission notes concern over concentration of ownership in a medium (cable) which is becoming an important "opinion molder." (at 817).

35. 406 U.S. 649 (1972).

36. 415 U.S. 394 (1974).

37. First Report and Order, 20 F.C.C. 2d 201 (1969), 23 F.C.C. 2d 825 (1970).

Midwest Video Corporation requested a judicial review of the rules claiming they exceeded F.C.C. statutory authority.

In the lower court decision, the Eighth Circuit Court of Appeals, per Judge Van Oosterhout, held for Midwest. [38] In his decision, the judge followed the path carved by the Supreme Court in Fortnightly, viewing cable as an extension of the viewer's antenna. The court did concede that cable was a "new and distinct form of electronic communication," [39] but would go no further. Had the court additionally declared cable to be a medium for the production of messages, a variety of constitutional questions could have been addressed. But as had previous courts, it avoided the question by maintaining the Fortnightly line. Quoting from that decision, Van Oosterhout found that, "essentially, a CATV system no more than enhances the viewer's capacity to receive broadcast signals." [40]

Given the intrinsically passive nature of cable, the F.C.C. could not, reasoned the court, convert it into an active system of production akin to broadcasting; such a rule was not reasonably ancillary to its authority to regulate over-the-air TV. [41]

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38. 441 F.2d 1322 (8th Cir. 1971).

39. Id. at 1326.

40. Id. at 1325.

41. Id.

While the premise from which the court proceeded is problematic, the internal logic of the decision cannot easily be faulted. Without a thread to link CATV to other protected forms of communication, no constitutional issues can be culled from the decision. The same cannot be said, however, for the decision of the Supreme Court, which overturned the ruling on appeal. Justice Brennan, writing for the plurality, found that local origination rules were within F.C.C. power.

The major points of the decision included an observation by Brennan that the general authority of the F.C.C. over cable through the Interstate Commerce Clause had not been questioned, that it was true that cable did not use the spectrum and so scarcity was not an issue, but that the scarcity rationale was unnecessary due to the intent and effect of the regulation. Explained the Justice:

> To be sure, the cablecasts required may be transmitted without the use of the broadcast spectrum. But that regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals, the viewers are provided suitable diversified programming -- the same objective underlying regulation sustained in N.B.C. v. U.S. [42]

The first major problem with the decision of the Court in this case was that in upholding the rules requiring local origination, the Justices denied their previously enunicated

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42. Id. at 669.

model of CATV as a mere extension of the home antenna. In footnote, Brennan attempted to reconcile these decisions by alluding to separate CATV functions of origination and retransmission, but the issue seemed dealt with in only lukewarm fashion and the discussion ignored the broader nature of cable as a complex but integrated whole, giving rise to a vision of government regulation of newspapers based on the multiple functions of that medium. [43] Despite its denial, therefore, the Court not only reversed its conceptual position by acknowledging the role of cable as a form of message origination and transmission, it forced the medium into that role. CATV was swiftly, and in this case most reluctantly, elevated to the level of information producer and as such the entire range of First Amendment guarantees should have come into play. Had this been the case, however, the Court would have found itself saddled with a substantial dilemma, for by admitting the absence of the scarcity rationale, it was removing the only bridge that spanned the First Amendment barriers to F.C.C. regulation. The Court would have been left with little upon which to sustain a finding that general F.C.C. jurisidiction was unconstitutional. It is a fundamental internal contradiction within the decision; by upholding the origination rule while dismissing the scarcity argument the Court at one time created a new protected medium and removed the main justifi-

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43. Id at n.22.

cation for governmental control.

Had the Court seen this connection, the outcome of the case would no doubt have been much different. As it was, Justice Brennan either missed the logic of the relationship or simply avoided it. Evidence from the language of the decision points to the former. Brennan states that lack of scarcity did not diminish the strength of the F.C.C. position because the intent and effect of the rule was to advance free speech interests, that is, it was, as in Red Lion, the right of the public which was paramount. [44] It can be argued, however, that the prevailing weight of the public's interest in broadcast cases is made possible only by exercising the scarcity argument, that without such a technological underpinning, the public's First Amendment interests cannot overpower the individual's. [45] In short, a fuller exposition of the facts of the situation might have found Justice Brennan arguing against himself.

The minority view in Midwest Video I is more consistent. Like the appeals court, the dissenting Justices, led by Justice Douglas, argued from Fortnightly that cable TV was not a broadcasting service and could not be turned into one at the whim of the F.C.C. [46] Nonetheless, the

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44. Id.

45. See, e.g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

46. 406 U.S. at 679.

minority still fell into the constitutional contradiction, conceptually if not practically, by suggesting that the F.C.C. would have authority to regulate were CATV operators to voluntarily begin program origination. 47 The dissenters failed to realize that whether it be mandatory or voluntary, once CATV program origination begins, the operator necessarily becomes a First Amendment speaker and the convenient fiction of cable television as a simple extension of the viewer's antenna falls apart.

Outwardly, Midwest Video I is one of many cases in which the Court attempts to give a regulatory agency the maximum latitude in the area of its congressionally mandated expertise. By long-standing precedent the Court is most reluctant to interfere in the affairs of an agency absent questions of due process. At a deeper level, however, the case betrays the growing confusion of the Court as to the nature of the evolving medium and how to approach it at the regulatory level. The Justices appear to concede that cable is something more than just an auxiliary broadcast service. But there is great hesitation to take the next step, to admit that the creature they are dealing with is rapidly changing in nature and form and that the previous regulatory and constitutional framework may no longer be adequate to deal with it. The plurality in Midwest Video I mandates a new communication medium but fails to see that a change in

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47. Id. at 680.

law must follow. Because of this failing, Midwest Video I is probably the most confused decision of the Court in the area of cable TV and most certainly its worst. Chief Justice Burger, in his lukewarm concurrence, admits that:

> Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by the decisions of the Commission and the Courts. [48]

It appears then that even the Court is uneasy with the F.C.C. and is struggling with the issue itself.

Similar confusion and contradictions were apparent two years later when the Court was asked to review its ruling in the Fortnightly case. In Teleprompter v. CBS, Inc. the Justices were specifically asked to rethink their position on the grounds that there had taken place a fundamental change in the medium itself. Cable television, argued the plaintiffs, was no longer the simple community antenna service described by the Court in 1968. It had evolved into a medium which was taking an active part in the selection, alteration and redistribution of television signals, and therefore was to be held liable, at least in some circumstances, for copyright infringement.

The appeals court was at least partially sympathetic to the plea and constructed a formula for compromise in which copyright would apply only to signals imported from distant towns and which viewers could not normally receive. Copy-

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48. Id. at 676.

right would not apply to retransmitted signals viewers could get without the aid of CATV. [49]

While the copyright question, as previously noted, is a Type 1 case and does not raise obvious constitutional issues, it does provide insight into the evolution of Court thinking with respect to the medium. The Supreme Court majority in this case rejected the appellate court's innovative solution, steadfastly holding to the position taken in Fortnightly. Stated Justice Stewart, for the Court, "The reception and rechanneling of these (TV) signals is essentially a viewer function." [50] He denied the possibility that cable operators exercised any broad choice in the programs they selected and carried. Broadcasters, he asserted, maintained a wide latitude in selecting programs, but CATV only picked up one signal from the airwaves, at which time its editorial freedom was extinguished. [51] The majority decision appeared to conflict with the notion of cable as a message producer, a role which the Court mandated for cable in Midwest Video I two years before. It thereby underscored the Court's continued confusion about CATV.

On the other hand, the minority opinion in Teleprompter suggested the beginning of a new viewpoint. Justice Doug-

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49. C.B.S., Inc. v. Teleprompter Corp., 476 F.2d 338 (2nd Cir. 1972).

50. 94 S.Ct. at 1138.

51. Id. at 1139.

las, joined by Justice Burger, argued -- in concert with the plaintiffs -- that there had been an important change in the medium. He stated that unlike the cable systems involved in Fortnightly, "present CATV's are functionally equivalent to a regular broadcaster." 52

There is just a hint in the decision, then, that the passive model of the cable television system was beginning to erode as judicial decision making moved into the latter 1970s. A broader summary would even suggest that through the early and mid 1970s several trends were beginning to emerge from the dominant theme struck in Southwestern and Fortnightly. These trends included a growing recognition of cable as an independent media form, a realization that the scarcity doctrine -- which was essential for the support of government authority over broadcasting -- was not satisfactorily applicable in cablecasting, and an embryonic awareness that alternative rationales for regulation such as natural monopoly or countervailing First Amendment interest were necessary to justify regulation if regulation were to be justified. In fact, even while the major body of case law through the 1970s reified a vision of cable lacking independent status, a scattering of isolated decisions pointed toward alternatives to the dominant paradigm. While these cases were the exception to the rule in the late 1960s and early 1970s, the ideas they explored were to become vanguard

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52. Id. at 1142.

concepts in the debate of latter years.

In general, these early cases threw into doubt the accepted model of cable as a strictly ancillary service without constitutional status, and probed possible rationales for regulation to overcome potential First Amendment barriers.

One such case was Greater Freemont v. City of Freemont.[53] Here, the district court found that when a cable company contracted with the local telephone company to do the actual stringing and maintenance of wires, the cable operator could not be regulated under a city franchise ordinance. The court reasoned that the franchise could be based only on the use of public streets, alleys, etc., and the cable company did not directly use these public thoroughfares. While this Type 3 case did not turn on the First Amendment question, the court did note in dicta that there was no great conceptual difference between CATV and "newspapers, television, radio, books and magazines" in that all delivered news and information.[54] Said the court:

> When we consider CATV in this role, we are approaching the areas of freedom of speech and the press protected by the First Amendment.[55]

The court then invoked the equal protection clause of the 14th Amendment explaining that controls similar to the

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53. 302 F. Supp. 652 (N.D. Ohio 1968).

54. Id. at 657.

55. Id.

one at issue for cable could not be applied to other media.

The value of the language in this decision is in its removal of cable from its classification as a passive conduit for these other media, and the establishment of CATV as a distinct communications system conceptually no different from print or broadcasting. Of course, with such an elevation in definitional status comes concurrent protection under the First Amendment. It was an important step. On the other hand, the court in this case failed to make the important constitutional distinction between the variable rights of different media (i.e., broadcast versus print). The case, therefore, provides no grounding for the form that cable rights might take. It implies cable is not like a retransmission service, but fails to suggest what it is like, that is, is it more like newspaper or more like a TV station?

Another subtle shift toward a different view of the governmental relationship to cable TV was seen in Great Falls Community TV Cable Co. v. F.C.C. in 1969. [56] The case arose from another First Amendment challenge to the F.C.C.'s non-duplication rules, but differed from previous attacks in that it called upon the Supreme Court's then recent decision in Red Lion Broadcasting v. F.C.C. [57] to distinguish between constitutional broadcast and cable regula-

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56. 416 F.2d 238 (9th Cir. 1969).

57. 395 U.S. 367 (1969).

tions. The company contended that the Red Lion decision proceeded directly from the scarcity doctrine and without such scarcity in cablecasting, F.C.C. content rules could not be justified. The Ninth Circuit Court rejected this argument, but in doing so made some implicit concessions to the company's position. Said the court:

> In our view, nothing in Red Lion impairs the authority of (previous decisions on this point). Although it is true that the Red Lion opinion proceeded from the scarcity-frequency premise, the Court expressly declined to reach arguments justifying the (fairness) doctrine on other, independent grounds. [58]

The hidden suggestion here is that there is no relevant nexus between the regulation of broadcasting through the use of the scarcity doctrine and the regulation of cable. Whereas in previous cases, the symbiotic relationship of cable and television was used to justify the application of scarcity-based broadcasting cases to F.C.C. authority over cable, in Great Falls, there is a quiet hint that such extensions might not stand rigorous scrutiny. Therefore, the court engaged in some precedent stretching to suggest that other rationales might be invoked to justify the rules in broadcasting and by extension in cable.

The rationale the court eventually promoted was that of the supremecy of the First Amendment rights of the public and the F.C.C.'s role in guarding those rights, echoing regulatory thinking that was becoming popular at this time. [59]

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58. 416 F.2d at 241.

59. Id. at 241.

But at no time did the court admit that there might be CATV operator rights at stake as well.

Two important concepts seem to be developing in this case: first, an implicit admission of the inapplicability of scarcity-based cases as precedent for CATV cases; second, and perhaps more importantly, the start of a judicial search for some basis upon which to rest government authority over cable. It is this latter point which seemed destined to become the focal point of cable case law and which was the major issue of interest in the third case in this series, TV Pix, Inc. v. Taylor. [60]

One of the questions that had been brewing for several years at the state level was the control of cable by local and state agencies. A significant element in the discussion was cable's status as a public utility. The debate reached the federal level for the first time in TV Pix where the district court of Nevada upheld the state's right to regulate cable as a public utility. Although the issues were not presented in any constitutional context, the question of cable's role as a utility spoke directly to the problem of fashioning a rationale for regulation that was not dependent upon the medium's relationship to broadcasting. The problem with the public utility approach is that it is not entirely

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60. 304 F. Supp 459 (D. Nev 1968), aff'd mem., 396 U.S. 556.

clear whether CATV qualifies as such. A variety of elements need be present for the invocation of public utility status [61] and as early as the late 1960s, the presence or absence of some of the some elements was being debated in the courts. So in TV Pix the court concluded that the use of public streets, alleys, byways and other property over which the cable company needed to lay wire, plus the probable classification of cable as a natural monopoly supported designation of CATV as a public utility. Said the court:

> As the facts appear from the record before us and the controlling precedents, there is no reason to conclude that community antenna service is not monopolistic in character and is not affected with the public interest. State supervision of it as a public utility does not conflict with the Fourteenth Amendment. [62]

But in Greater Freemont the issue of cable's classification as a public utility also was considered, and in that case the court reached just the opposite conclusion. [63] In addition to noting that cable had similarities to other protected media, the court found cable lacked the requisite elements that delineate a public utility, those being a significant public need and a position as a monopolistic or

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61. Public utilities generally are regarded as private businesses impressed with a necessary public interest and are often monopolistic in nature. See, generally, 73 C.J.S. secs. 1, 2.

62. Id. at 467. See also, Springfield Television, Inc. v. City of Springfield, 462 F.2d 21 (8th Cir. 1972).

63. 302 F. Supp. at 665.

oligopolistic industry. Explained the judge, with little regard for the sensitivity of cable operators:

> The first of these characteristics clearly is not present. The public has about as much real need for the service of a CATV system as it does for hand carved ivory back-scratchers. Even if in fact the CATV system is the only one in the market, it is not a monopoly in the economic sense. . . . [64]

The court based its latter comment on a finding that there was no great public inconvenience in the stringing of additional wires by competing cable companies. [65]

In neither of these cases was the issue of public utility status considered in direct juxtaposition to the question of First Amendment cable rights. Again, the dominant view at this time was expressed in the line of court decisions that viewed cable as less than an independent medium and therefore lacking any standing for a claim of First Amendment protection. But the cases discussed here contained the seeds of future consideration of the important constitutional questions.

The Courts and Cable: A Search for Direction

As judicial consideration of cable moved into the late 1970s and early 1980s then, the issues discussed in TV Pix, Greater Freemont and Great Falls served as the starting

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64. Id.

65. Id. at 657.

points for debate about CATV First Amendment status. Four cases in this more recent period are of particular interest as they represent the foundation for and current status of the debate about constitutional protection for cable-delivered speech. The cases include Home Box Office v. F.C.C., [66] Midwest Video Corp. v. F.C.C., [67] Home Box Office v. Wilkinson, [68] and Community Communications Co., Inc. v. City of Boulder. [69]

H.B.O. v. F.C.C.

Home Box Office v. F.C.C. in 1977 was the first major case dealing with F.C.C. cable rules to come to the federal courts after Midwest Video I, and it marked an important turning point in cable rights. At issue were F.C.C. rules governing and limiting the programming cablecasters could offer on a pay basis. [70] Under the rules in question operators were prohibited from offering on a subscriber basis certain movies and sporting events. The Commission, and competing broadcasters, claimed cable could, potentially, siphon such programming away from "free" television and into

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66. 567 F.2d 9 (D.C. Cir. 1977), cert. den. 434 U.S. 829 (1977).

67. 571 F.2d 1025 (8th Cir. 1978), aff'd, 99 S.Ct. 1435 (1978).

68. 531 F. Supp. 987 (D. Utah 1982).

69. 7 Med. L. Rptr. 1993 (1981), rev'd, 50 U.S.L.W. 4144.

70. See, 47 C.F.R. Sections 76.643, 76.225 (1975).

subscriber-cable services and that such competition was not in the public interest.

The D.C. Cicuit Court held against the F.C.C. and struck down the prohibitive rules. It found that the regulations went beyond the F.C.C.'s statutory jurisidiction concluding that the rules violated the First Amendment rights of cablecasters. [71] (The court also held that ex parte contacts between F.C.C. personnel and special interests during hearings over the regulations violated due process.) The significance of the decision for present purposes was that it marked the first major application of First Amendment protection to cable. In extending this protection, the Court took time to consider at length the appropriateness of the use of the scarcity doctrine in cable regulation. Previous courts, as has been noted, admitted the absence of scarcity, but always seemed to circumvent the problem. The D.C. Circuit was more honest, stating flatly:

> The First Amendment theory espoused in National Broadcasting Co. and reaffirmed in Red Lion Broadcasting cannot be directly applied to cable television since an essential precondition of that theory -- physical interference and scarcity requiring an umpiring role for government -- is absent. [72]

The court went on, in footnote, to criticize earlier cable decisions in which scarcity, directly or indirectly, was called upon as a justification for regulation. According

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71. 567 F.2d at 49.

72. Id. at 45.

to the court, such previous decisions were clearly mistaken in their thinking. [73] It was noted, for example, that in Buckeye Cablevision, ". . . the court, without discussion, cited National Broadcasting Co. and Carter Mountain, thus apparently incorrectly treating the case as one involving the scarcity and allocation rationale." [74]

Cases such as Buckeye and Black Hills could not, therefore, be validly used to support the proposition that the cable regulations at issue were constitutional as extensions of the justifiable rules used in the regulation of broadcasting.

Home Box Office was pivotal in that it signaled the fruition of a judicial view of cable television as an independent medium of communication rather than an adjunct of an already established media form. Here the court pulled cable away from over-the-air TV in a dramatic way by stating that it was more closely analogous to the print medium. [75] The court pointed out that even if an argument could be made that cable was economically, rather than technically, a scarce resource, such a showing could not be sufficient to establish grounds for the kind of government regulations at issue. Stated the court:

> In any case, scarcity which is solely of economic

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73. Id. at 45 n.80.

74. Id.

75. Id. at 46.

> conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press (see, Miami Herald Publishing Co. v. Tornillo), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point. [76]

In this passage, the court elevated CATV out of its 25-year status as an auxiliary service. It appeared to give cable First Amendment standing equal to that of the print media. In fact, the test finally used by the court to determine the legitimacy of governmental intervention here was drawn from a symbolic speech case, United States v. O'Brien. [77]

According to the court, even in the case of pure speech, which is granted the highest standard of First Amendment protection, some government intervention is occasionally justified by a compelling state interest. [78] Such intervention is permissible, however, only when the regulations in question:

> further an important or substantial government interest; . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [79]

The court held the F.C.C. regulations to fall far short of the mark on both counts and accordingly found the rules

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76. Id.

77. 391 U.S. 367 (1968).

78. 567 F.2d at 48. (The court cited such doctrines as "fighting words", obscenity and the "clear and present danger" test.)

79. Id.

in violation of the First Amendment. In short, the importance of protected status of the communication medium was illustrated by the higher, more stringent test necessary for justification of government intrusion. Without such protection, government regulation could be premised on a vague doctrine of the public interest, but constitutional protection invokes at least the test of O'Brien which acknowledges important First Amendment concerns.

Unfortunately, the important gains made by cable in this case did not achieve the full status of a Supreme Court decision, for the High Court declined to grant certiorari.

F.C.C. v. Midwest Video

The next important case to come before the Supreme Court was F.C.C. v. Midwest Video (Midwest Video II) in 1979. [80] The case is significant for a variety of reasons, not the least of which being that it marked the High Court's first movement to strike down any F.C.C. cable regulation. The rules in question were the Commission's 1976 requirements on public and leased access channels. [81] Midwest Video Corp. challenged the rules as beyond the Commission's statutory authority and unconstitutional abridgments of expression.

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80. Supra, note 67.

81. Report and Order in Docket No. 20528, 59 F.C.C. 2d 294 (1976).

A strongly worded decision at the appellate level found in favor of the cable company and took a position that cable had significant First Amendment interests. [82] The D.C. Circuit stated bluntly:

> The Commission does not favor us with any views as to: (1) why cable systems are not entitled to the same First Amendment rights as other private media, such as newspapers and movie theaters; (2) how compelled access to cable facilities is distinguishable, in a First Amendment context, from compelled access to broadcast facilities; or (3) how its rule . . . requiring cable operators to exercise prior restraint in obscenity, and exposure of cable owners to law suits resulting from its access rules, can be justified. [83]

The court discussed cable in terms of "electronic publications" and found the F.C.C. rules analogous to government attempts to force newspapers to devote editorial pages to whomever wished to use them. [84] The court then proceeded to examine possible rationales for intervention in a cable operator's First Amendment rights. It examined, then quickly rejected, scarcity [85] devoting most of its attention to the F.C.C. contention that the rules served the broader First Amendment interests of the people in promoting a diversity of viewpoints . In weighing the asserted rights of the public against those of the cable owners, the court found the former wanting. The rights of cable operators

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82. 571 F.2d 1025.

83. Id. at 1055.

84. Id. at 1056.

85. Id. at 1048

arose, declared the court, from the Constitution; the public's right "to get on television" stemmed from the "Commission's desire to create that right." [86] As laudable as the F.C.C.'s goals may be, said the court, "we deal here with the Federal Communications Commission, not the Federal First Amendment Commission." [87]

Ultimately, the court invoked the "clear and present danger" test to gauge the legitimacy of government intrusion as represented by the Commission rules. [88] The regulations, unsurprisingly, failed to meet the stringent criteria of the test.

As in Home Box Office, then, the constitutional test applied to cable was one traditionally reserved for the stronger protection afforded "pure speech" cases, rather than the lesser tests associated with unprotected communication.

The appellate decision lacked the constitutional importance of strong precedent due to the court's ability to find the question on statutory grounds. Nonetheless, the court noted that:

> Were it necessary to decide the issue, the present record would render the intrusion represented by the present rules constitutionally impermissible. [89]

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86. Id. at 1054.

87. Id. at 1042.

88. Id. at 1053.

89. Id. at 1056.

On appeal, the Supreme Court upheld the lower court's decision and in the process at last conceded that cable had some characteristics of an independent mode of communication. Without recalling its earlier pronouncement that cable operators lacked any significant degree of editorial control over their product, the Court observed that CATV had advanced to a point where such control was common. Stated the majority decision:

> Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission itself has observed, "both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide." 90

The Court likened cable to broadcasting in several aspects but declined to draw any parallels between cable and the print media, as had the lower court. It elevated cable to a position of legal protection equivalent to that of the broadcaster, but would go no further. The limits of F.C.C. jurisdiction over broadcast television, held the Court, defined the limits of its jurisdiction over cable. Basing much of its thinking on the ancillarity doctrine, the Court drew heavily from its decision in C.B.S. v. D.N.C., in which a plea for mandatory forced access of broadcasters was rejected on the grounds that such access amounted to turning broadcasters into common carriers. 91 The regulations were

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90. 99 S.Ct. at 1445.

91. 412 U.S. 94 (1973).

thus rejected on statutory grounds and the Court never reached the more important question of First Amendment status raised by the lower court. [92] Had the issue been broached, the Court, it seems, might very well have had to follow the logic of the D.C. Circuit and reject the rules on constitutional grounds, a decision that could have paved the way for additional First Amendment challenges to F.C.C. authority over cable.

H.B.O. v. Wilkinson

Another, more recent case in which a state prohibition on cable content was overturned on First Amendment grounds was that of Home Box Office v. Wilkinson [93] There, a coalition of cable operators sought an injunction against enforcement of a Utah statute enacted to prohibit the cablecasting of obscene and indecent programs. [94] The law itself contained language that made it a crime to disseminate over cable not only legally obscene material but also programming that included nudity in nearly any context.

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92. In foonote 19, (at 1446), the Court stated, "The court below suggested that the Commission rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute.

93. Supra note 68.

94. Utah Code Ann., sec. 76-10-1229.

At least two lines of reasoning were available to U.S. District Court Judge Jenkins in this Type 4 case. In the first instance, he could have followed the early view of cable which linked it with broadcast television for constitutional purposes. Under federal law, the airing of indecent material by broadcasters is prohibited, [95] and in F.C.C. v. Pacifica Foundation [96] the Supreme Court upheld the F.C.C.'s constitutional authority to regulate the time and manner in which indecent, rather than obscene, speech could be presented by broadcasters. One of the main arguments of the government in that case was the alleged availability of the material to minors. The same argument was used by Utah in Wilkinson in the state's attempt to defend the statute against charges of unconstitutionality. [97]

On the other hand, the court could have followed the precedent laid down in obscenity law as it has traditionally been applied to print and speech. The current standards here are outlined in Miller v. California, [98] and its progeny, under which the mere presence of nudity or even sexual intercourse is insufficient in itself to brand a work obscene.[99]

Further, this view could call upon the Supreme Court's

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95. 18 U.S.C. sec. 1464; 47 U.S.C. secs. 503(b), 303(m)(1)(d), 312(a)(6).

96. 438 U.S. 726 (1978).

97. 531 F. Supp. at 99€.

98. 413 U.S. 15 (1973).

99. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974), and Schad v. Mt Ephraim, 452 U.S. 61 (1981).

1957 decision in Butler v. Michigan to rebut the contention that the standards for adult reading should be based on a consideration of what was appropriate for children. [100]

In fact, Judge Jenkins followed the latter path, using an approach grounded in print and speech cases and applying the standards of Miller and Butler rather than those of Pacifica to find the Utah law in violation of the free speech rights of the cablecasters.

In addition, the court noted the irrationality of "discriminating against one technology" by making illegal material that was available legally in other forms. [101] The court also pointed out the potential and attraction of cable as a medium that offered great choice to the public, a characteristic the court proclaimed ought be protected, not restricted, by the state. [102] Both comments pointed to a full awareness of cable as a medium with characteristics and rights different from those of broadcast television.

While many of these more recent cable cases suggest a trend toward growing First Amendment rights for cable operators, there has yet to be a strong judicial statement that general local or federal jurisdiction over cable is violative of the Constitution. In fact, despite cases favorable to cable rights, the dicta of the courts, even in such

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100. 352 U.S. 380 (1957).

101. 531 F. Supp. at 996 n.18.

102. Id. at 1002.

cases, suggests a position that some large but undefined degree of government control is not only permissible but desirable. For example, it has been noted that both the appeals court and the Supreme Court dissenters in Midwest Video I would have permitted F.C.C. regulation of cable-originated programs had the origination been voluntary. In Midwest Video II, the Court distinguished the rules mandating access with those requiring origination by finding the latter acceptable on the grounds that the cablecaster maintains editorial control. But had the Court extended its newspaper analogy it would have raised the issue of forced speech. Similarly, while the Supreme Court majority opinion in Midwest Video II declared the rules in question to be outside F.C.C. statutory authority it went on to state that such authority would be within the power of Congress to forge. [103] Such propositions come from a lack of consideration of the constitutional spectres they raise. Further, they call the question of what rationales might be found, beyond those applied to print, that would legitimize government control over the medium, as the courts appear wont to do. Within the context of judicial decision making reviewed here, several approaches to this latter question have been suggested.

The original rationale for permitting government regulation despite First Amendment protection stemmed from the

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103. 99 S.Ct. at 1446.

perceived relationship between cable and broadcast television and is summarized through the ancillarity doctrine as enunciated in Southwestern. It appears, however, that beginning at least with HBO v. F.C.C. the concept of cable as a simple extension of the viewer's antenna had been breaking down. As to the precise nature of the ancillarity doctrine itself, a close reading shows it only to describe the outer boundaries of F.C.C. authority over cable, that is, the government cannot regulate that which is not ancillary to its duties concerning broadcasting. This is not an enabling justification for original jurisdiction over the medium; it alone does not act as a lever by which the F.C.C. can insert itself into cable. This is made quite clear by the Court's decision in Midwest Video II. Here the F.C.C.'s general jurisdiction is not disputed, only the nature of the rules in question.

The core of F.C.C. authority over cable, according to the Court, is Section 152(a) of the Communications Act. But would this be sufficient cause to override First Amendment protection were it afforded cable? Such a proposition is, at best, problematic, and, in fact, probably quite weak.

An alternative rationale for government regulation and one which has been considered by the courts from time to time has been that of the countervailing First Amendment interest of the public to have an outlet of local expressi and to receive a variety of editorial viewpoints. The court in Great Falls, therefore, found the F.C.C. to be serving

the broader goals of the First Amendment in regulating cable, noting from Red Lion that "It is the right of the public to receive suitable access to social, political esthetic, moral and other ideas and experiences which is crucial under the First Amendment." 104 On the other hand, the court in Midwest Video II specifically rejected the argument that the Commission could replace the First Amendment rights of cable operators with those of the public. This issue has yet to be adequately addressed by the courts.

Conceptually akin to the notion of the rights of the people and to the scarcity doctrine is the proposition that cable can be controlled by the state as a quasi-public utility due to its alleged status as a natural monopoly. As previously noted, this point was discussed in TV Pix and in Greater Freemont

The possibility of regulating cable on this basis is enticing, and its ramifications also have not yet been fully explored by the courts. The most recent and extensive treatment of this view, and of the opposing view that cable cannot be constitutionally regulated by the state in any way, came in the 1981 case, Community Communications Co. v. Boulder. This case is important in that, even though it is generally a Type 3 case, it marks one of the most current and thoughful judicial considerations of the issue of cable television's status under the First Amendment.

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104. 416 F.2d at 242.

C.C.C. v. Boulder

The rather involved facts of C.C.C. v. Boulder center around an attempt by the city of Boulder, Colorado, to prevent a franchise, Community Communications Co., from expanding beyond the specific neighborhood which it had for some years been serving. The city, after long debate, decided to revoke the company's original franchise, which had given CCC the right to wire the entire city, and replace it with a franchise that restricted the company to that one particular neighborhood. In a series of legal actions in federal court, the company challenged the city's moves as violations of both federal antitrust laws and the First Amendment. [105] While final disposition of the case rested only upon the antitrust question, the First Amendment issues were given extensive consideration at both the district and appellate court levels. [106]

The cable company argued that Boulder's attempt to prevent it from expanding its service area represented an unlawful prior restraint on its right to communicate. It

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105. C.C.C. v. Boulder, 485 F. Supp. 1035 (D. Colo.), rev'd 630 F.2d 704 (10th Cir. 1980) (Boulder I); C.C.C. v. Boulder, 496 F. Supp. 823 (D. Colo.), rev'd 7 Med. L. Rptr. 1993 (10th Cir. 1980), rev'd 50 U.S.L.W. 4144 (1982) (Boulder II).

106. The Supreme Court finally held for the company on the grounds that the city's actions violated certain antitrust guidelines, specifically, municipalities were not immune from antitrust unless they had specific state legislative mandates. The Court declined to consider the constitutional question. Id.

claimed that similar prohibitions on newspapers would be struck down as unconstitutional and, for purposes of the case at hand no difference existed between cable and print. The city responded by declaring the newspaper analogy inappropriate and claiming that cable was a natural monopoly. Therefore, said the city, some reasonable governmental control did not offend the constitution. 107

The federal district court and Appellate Court Judge Markey , dissenting in the first of two appeals court decisions, sided with the company. 108 While only a dissenting opinion, Judge Markey's position is important for it represents one strong side of the debate, as well as the decision of the lower court. The judge first concluded that cable was constitutionally protected in the same manner as newspapers, stating:

> When, as studies show, the majority of our people get their news from television, I cannot, in First Amendment jurisprudence, and concerning action to still a growing voice, distinguish the dissemination of news and information by cable TV from that by newspapers. 109

He also argued that the city's actions violated not only the rights of the cable operator to speak, but also the right of the public to listen. Said the Judge:

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107. The two sides also debated whether the proposed controls were content neutral, but this issue did not significantly figure in the courts' decision making.

108. 630 F.2d at 709 (1980).

109. Id. at 714.

> In effect . . . the city has said to CCC, "Thou shall not speak your truth to any Boulder citizens residing outside your present area of operations for 90 days." To Boulder citizens in those areas, the city has said, "Thou shall not for 90 days hear CCC's speech." It is difficult to imagine a more flagrant and chilling inroad on cherished First Amendment freedoms. [110]

Unlike previous debates which pitted the rights of the public against the rights of the cablecaster, Makey thus joined the arguments against the state; but while his rhetoric was stirring, the logic suffered by failing to show that the citizens of Boulder would not benefit just as much, if not more, from service by a competing company.

More importantly, Markey and the district court attacked the city's proposition that cable was a natural monopoly and therefore regulation was permissible. They first questioned the existence of technical scarcity. "Not to put too fine a point on it," stated Markey, "that argument is today simply fallacious." [111] The district court found, and Markey agreed, that at least four competing companies could be comfortably accommodated without adversely affecting the public ways. [112] Finally, underscoring the analogy to newspapers, Markey drew on Tornillo to argue that even if economic scarcity existed in this context it was not sufficient reason to ignore the First Amendment interests of the

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110. Id. at 712.

111. Id.

112. Id. at 712 n.8.

cable company. [113] Economic scarcity does not justify government intrusion into First Amendment rights, he stated. The conclusion, then, was that there was no justification for the city's attempt to regulate cable in this manner.

In response, the Tenth Circuit majority implied that the arguments of the company, Judge Markey and the district court were simplistic and failed to take into account obvious differences between the print or cable media. [114] According to Judge Seymour, writing for the court, the newspaper analogy did not stand up under close inspection. Said the judge:

> to summarily apply to cable operators the First Amendment principles governing newspapers. The nature and degree of protection afforded to First Amendment expressions in any given medium depends on that medium's particular characteristics. [115]

According to the court, unlike newspapers, cable must create a significant disruption, in the form of stringing wire either on poles or underground, in order to deliver its message. Local governments must be permitted to regulate such public inconveniences. [116]

More importantly, the court accepted the proposition that scarcity, at least economic scarcity, was sufficient justification for government intervention into an otherwise

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113. Id. at 714.

114. 7 Med. L. Rptr. 1993.

115. Id. at 1997.

116. Id. at 1998.

protected area of expression. Specifically, the court held that the application of the Miami Herald case was misplaced because of the qualitative differences in the types of relationships between cities and newspapers and cities and cable companies. Argued the court, the Miami Herald case involved an effort by the state to compel access to a medium "that is not tied to government in the way that cable companies necessarily are." [117] In the cable industry, explained the court:

> There is no tradition of nearly absolute freedom from government control. Most importantly, a cable company must significantly impact the public domain in order to operate; without a license it cannot engage in cable broadcasting to disseminate information. [118]

At least two problems exist with the court's reasoning here, however. First, it did not directly address the issue of whether real technical scarcity existed; an important question. Second, its rebuttal to the argument of economic scarcity is circular; the right of government to reguate cable, posits the court, is justified because government has always regulated cable. The attempt to save the argument by contending there is significant disruption of public domain in laying cable is like asserting government control over newspapers based on the street disruption caused by the construction of a new building or printing plant; the argument

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117. Id. at 1999.

118. Id.

is unconvincing.

More compelling is the Court's suggestion that varying degrees of scarcity or monopoly, whatever the cause, might support varying degrees of governmental oversight. Explained Judge Seymour:

> For example, differences in (1) the degree of natural monopoly or scarcity characterizing the medium, (2) the pace and potential for technological change, or (3) the uses and possible uses of the medium such as two-way cable communications, even interconnection, might make kinds of regulations constitutionally permissible in one medium that would be forbidden in another. 119

While this tantalizing notion is not explored at length in the decision, it poses at least some new ideas for the application of First Amendment rights to cable.

Summary

C.C.C. v. Boulder appears to be a "state-of-the-art" exposition of the First Amendment status and problems of cable delivered expression. It seems to accept that cable is a medium and a speaker for First Amendment purposes. But this only begins the problem, it does not solve it. As demonstrated here, the court remains confused about whether there exists a sound rationale for government regulation of cable speech, what form such a rationale might take if it does exist, and the nature and extent of permissible controls given a particular rationale.

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119. Id. at 2000.

At present, the courts have answered none of these questions satisfactorily. The Supreme Court has repeatedly declined to even consider the issue and the lower courts have split on both the rationale for and the extent of constitutionally justifiable regulation. Cable is, therefore, a medium with First Amendment protection only in the abstract, at best; an unsettling state of affairs for the industry, for government, and for a public which more and more is coming to rely on cable for much of its news, information and opinion.